Supreme Court, U.S.
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No. 97-219

In The

Supreme Court of the United States

October Term, 1996

PENOBSCOT INDIAN NATION,

Petitioner,

v.

KEY BANK OF MAINE, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does 25 U.S.C. § 81 apply to one of two settlement agreements entered into by the Penobscot Indian Nation, a Maine Indian tribe subject to the Maine Indian Claims Settlement Act?

DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Defendant-Respondent Key Bank of Maine, now known as KeyBank, National Association identifies the following parent companies and nonwholly owned subsidiaries:

Parent – KeyCorp.

Nonwholly owned subsidiaries:

Ascot Leasing Partners, Ltd. (19.8% limited partnership interest)

Baptist Village II, Limited Partnership

Bear Peak Limited Partnership (19.5% limited partnership interest)

Brentford Leasing Partners, Ltd. (19.8% limited partnership interest)

Eurotech Leasing Corp.

Forest View Apartments Associates Limited Partnership

Glasstech Holding Co.

Glasstech, Inc.

Holborn Leasing Partners, Ltd. (19.8% limited partnership interest)

Juniper Hill, Inc. (50.0% interest)
Bear Peak Limited Partnership (1.0% general partnership interest)

Kent Leasing Partners, Ltd. (19.8% limited partnership interest)

DISCLOSURE STATEMENT – Continued

Leasetec Funding Corp. I

Leasetec Funding Corp. II

Leasetec Funding Corp. III

Leasetec Management Co. (inactive)

Mitel Capital Corporation

StorageTek Financial Services Corporation

Sutton Leasing Partners, Ltd. (19.8% limited partnership interest)

Technology Leasing Solutions, Inc.

Unisys Leasing Corporation

Leasetec Corporation International
- BPM (Europe) Limited (80.0% interest)
- DEClease (Hong Kong) Ltd.
- DEClease Singapore Pte. Ltd.
- Leasetec Asia Limited
- Leasetec Belgium N.V.
- Leasetec Canada Ltd.
- Leasetec France SARL
- Leasetec GmbH (inactive)
- Leasetec International AB
- Leasetec Investments Pty. Limited
- Leasetec Leasing En Financiering B.V. (inactive)
- Leasetec Maatwerk in Lease B.V. (inactive)
- Leasetec Mexico S.A. de C.V.
- Leasetec Singapore Pte. Ltd.
- Leasetec UK Limited
- Saxum Aktiebolag
- StorageTek Financial Services Canada Ltd.
- Storagetek Location SARL

DISCLOSURE STATEMENT – Continued

StorageTek Miet-und Leasinggelsellschalt mbH
Leasetec Australia Pty. Limited
Leasetec New Zealand Limited

Pursuant to Supreme Court Rule 29.6, Defendant-Respondent Consumers Water Company identifies the following nonwholly owned subsidiaries:

Consumers Maine Water Company
Consumers New Jersey Water Company
Consumers Pennsylvania Water Company

Pursuant to Supreme Court Rule 29.6, Defendant-Respondent Burlington Homes of New England, Inc. identifies the following parent company:

Consumers Water Company

Pursuant to Supreme Court Rule 29.6, Defendant-Respondent SHC Corporation identifies the following parent company:

Consumers Water Company

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STATEMENT OF THE CASE

The Statement of the Case of Plaintiff-Petitioner Penobscot Indian Nation ("PIN") is accurate, but omits facts relevant to the question whether grant of certiorari would be appropriate. Respondents Key Bank, National Association ("Key Bank" or "the Bank"), Consumers Water Company ("Consumers"), Burlington Homes of New England, Inc. ("Burlington") and SHC Corporation ("SHC"), therefore, supplement PIN's Statement as follows.

I. The Partnership, Sale and Loan to SHC

PIN is an Indian tribe subject to the Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1721-1735 and 30 M.R.S.A. §§ 6201-14. (See PIN's cert. petition at A-27.) On December 31, 1986, PIN formed a limited partnership with Palmer Management Corporation, for the purpose of purchasing SHC, a mobile home sales business. (PIN cert. petition at A-3 to A-4.) Pursuant to the Partnership Agreement, PIN became the sole limited partner and Palmer Management the sole general partner. (*Id.*) PIN chose this partnership structure and a role as passive investor for tax purposes and to limit its liability. (Appendix or "App." at 2243, 2245, 2828.)

Upon submission of the Partnership Agreement to the Bureau of Indian Affairs ("the BIA"), the BIA informed the parties that no BIA approval of the Agreement was needed under 25 U.S.C. § 81, because the Agreement "does not encumber trust land or other trust

assets." (PIN cert. petition at A-20.)[1] This conclusion – that Section 81 applies only to agreements involving trust land – has been voiced elsewhere by the BIA. (*Id.* at A-21, citing *Barona Group of the Capitan Grande Bande of Mission Indians v. American Management & Amusement, Inc.*, 840 F.2d 1394, 1404-05 (9th Cir. 1987).)

Also on December 31, 1986, the Partnership bought SHC's assets and business from Consumers, pursuant to a Purchase and Sales Agreement, for approximately $5 million. (*Id.* at A-3 to A-4.) Key Bank financed the purchase. *(Id.)* PIN posted a $1 million letter of credit to secure the loan. (*Id.*)

On October 5, 1987, PIN entered into a Lease-Option Agreement with the Partnership for a parcel of land located in Holden, Maine ("the Holden Lot"). (*Id.)* The Holden Lot was fee land as opposed to trust or tribal land, *i.e.*, it was bought by PIN in fee simple for investment purposes. It was not property held by the United States in trust and was not subject to any trust responsibility by the federal government. (*Id.* at A-13 to A-14.)

In December 1988, with the Partnership unable to make its loan payments, the loan was restructured. PIN allowed the letter of credit to be called, purchased a $200,000 short term note from another bank for working capital and subordinated that note to amounts due Key

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[1] Section 81, in pertinent part, requires approval of the Secretary of Interior for all agreements made by any person "with any tribe of Indians, or individual Indians not citizens of the United States" for payment or delivery of any money or other thing of value "in consideration of services for said Indians relative to their lands."

Bank. (App. 2313, 2317, 465, 1437.) Through these means, the Partnership reduced its debt to Key Bank by approximately $1.2 million. The Partnership also pledged the Lease-Option Agreement to Key Bank. (PIN cert. petition at A-5.)

In April 1989, with still no improvement in the Partnership's business, the Bank demanded full payment of its loan to the Partnership. (App. 1834, 2930-31.) In May 1989, the Bank notified PIN that it intended to exercise the purchase option contained in the Lease-Option Agreement, and tendered the purchase price ($100,000). (*See id.* at A-5, App. 886, 888-89.)

Acting on the advice of counsel, PIN decided to liquidate the Partnership. As a part of the liquidation plan, PIN assigned the Partnership's assets to the Bank. (PIN cert. petition at A-5.) The BIA approved the transfer of the Holden Lot pursuant to 25 U.S.C. §§ 1451-1543, which forbids, without written consent, any transfer or disposal of a project being improved with federal grant funds within three years of the use of such funds. (*Id.*)

II. The Settlement Agreements

On September 29, 1989, PIN entered into two comprehensive Settlement Agreements. The agreements "contained identical language that served broadly to release, remise and forever discharge all claims involving the signatories." (*Id.* at A-6.) In one Agreement, no mention was made of the Holden Lot at all; it was a simple exchange of releases. (App. 2345.) The second Settlement Agreement provided that the Bank would jointly, with PIN, seek a purchaser for the Lot at a mutually agreed

upon price. (*Id.* at A-11 to A-12; App. 2341.) The Bank, SHC and PIN were signatories to both Settlement Agreements. Consumers and Burlington were signatories to the second Agreement only. (*Id.*)

III. The Proceedings Below

Despite the entry into these two global Settlement Agreements, almost five years later PIN filed a nine-count complaint against the Bank, Consumers and others, alleging misconduct such as fraud and racketeering. (*Id.* at A-6 to A-7). As damages, PIN sought $1.2 million – the money it lost investing in the Partnership. (*See* PIN's Appeal Brief to the First Circuit at 8, 31, 34-35.) PIN argued that the Settlement Agreements did not preclude it from pursuing these claims, because, it claimed, the Agreements were void under 25 U.S.C. § 81.

The Defendant-Respondents filed motions for summary judgment, arguing that Section 81 did not apply to the Settlement Agreements (or the underlying Partnership, Purchase and Sale and Lease-Option Agreements), because none of these was an agreement with "an Indian tribe" involving payment for "services" relative to "Indian lands." A host of other defenses were raised, including (without limitation) lack of standing, statutes of limitations, res judicata, and failure to demonstrate a dispute of material fact as to each element of its underlying claims.[2]

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[2] With respect to the last defense, for example, the witnesses PIN designated as its representatives under F.R.Civ.P. 30(b)(6) each admitted that they were unaware of any facts

The District Court agreed with Defendant-Respondents that Section 81 did not apply, and, therefore, the Settlement Agreements remained enforceable, because those Agreements were an exchange of releases, not involving the provision of services related to Indian lands. (PIN cert. petition at A-53 to A-65). The District Court also found the racketeering claim barred by the statute of limitations. (*Id.* at A-64.)

PIN abandoned its RICO claim, but appealed the remainder of the District Court's decision. (*Id.* at A-8.). The First Circuit affirmed. The Court of Appeals agreed with the District Court that the first Settlement Agreement did not implicate Section 81, because it did not involve services. (*Id.* at A-11). As to the second Settlement Agreement, the Court stated that it would "assume for the purposes of its opinion" (*id.* at A-12) that the provision obligating the Bank to seek a purchaser for the Holden Lot entailed a "service" within the meaning of the statute. Nevertheless, the Court found, Section 81 would still not apply, because the Holden Lot was fee, not trust, land.

ARGUMENT

PIN claims that the First Circuit erred in finding that Section 81 does not apply to fee lands owned by an Indian tribe. It argues that certiorari should be granted under Supreme Court Rule 10(c), because, it states, the

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supporting claims of wrongdoing against the Bank. (App. 3089-90, 1182, 1903, 1489; C. Mitchell deposition at 87-94.)

Court of Appeals' holding "conflicts with relevant decisions of this Court."

I. THE FIRST CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY SUPREME COURT DECISION.

In rendering its opinion, the First Circuit stated:

> Although we have uncovered no precedent that explicitly considers whether or not § 81 applies to land that an Indian tribe purchased in fee simple for investment purposes, in doing so now we give voice to an assumption underlying virtually every decision addressing the applicability of § 81 to service agreements with Indian tribes relevant to their lands.

(*Id.* at A-13). As this statement suggests, along with the fact that the BIA adheres to this conclusion, no Supreme Court precedent conflicts with the decision below.

The "conflicting precedent" cited by PIN in its certiorari petition are: (1) *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985); and (2) *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980). The decision in *Montana*, however, simply provides that Indian statutes should be liberally construed. The First Circuit explicitly cited *Montana* in its opinion, acknowledging that it was construing Section 81 liberally, as required. (PIN cert. petition at A-12.)

In *Central Machinery*, the Court held that state taxation of certain sales transactions was preempted under the Indian "trader" statutes (25 U.S.C. §§ 261-64), because

comprehensive federal regulation in the area had occupied the field. 448 U.S. at 166. It is hard to see the relevance, let alone precedential impact of that ruling here. Not only did the decision not even involve Section 81, it went to issues of preemption. In contrast, here, the First Circuit properly focused on the language, purpose, precedent, legislative history, and agency interpretations surrounding Section 81 itself, to determine the statute's specific import.

Indeed, the *only* actual conflicting precedent on point is a trial court opinion from a district court within the First Circuit. *Narragansett Indian Tribe v. RIBO, Inc.*, 686 F.Supp. 48, 51 (D.R.I. 1988), *aff'd on other grounds*, 868 F.2d 5 (1st Cir. 1989). The First Circuit explicitly rejected the district court's reasoning in *Narragansett*, finding it contrary to common sense, the purpose of Section 81 and the reasoning of other courts. (*See* PIN cert. petition at A-25 to A-26, citing *Wisconsin Winnebago Bus. Comm. v. Koberstein*, 762 F.2d 613, 619 (7th Cir. 1985); *United States ex rel Shakopee v. PanAmerican Management Co.*, 616 F.Supp. 1200, 1217-18 (D. Minn. 1985).

In sum, no Supreme Court or Court of Appeals decision is contrary to the First Circuit's. To the contrary, as explained by the First Circuit in its decision, its ruling is consistent with existing precedent interpreting Section 81.

II. THE DECISION WOULD BE OF MINIMAL PRECEDENTIAL VALUE.

While no reason under Supreme Court Rule 10 exists for accepting certiorari, multiple reasons affirmatively militate against such a review.

First, PIN is a *Maine* Indian tribe, whose land and status is governed by the Maine Indian Claims Settlement Act. 25 U.S.C. §§ 1721-1735. Under that Act, Congress explicitly delineated between property lying within and outside Penobscot Indian Territory. Land within the Territory is tribal land. Land outside that Territory, such as the Holden lot "shall be held in fee . . . and the United States shall have no further trust responsibility with respect thereto." 25 U.S.C. § 1724(d)(3).

The Settlement Act also treats Maine Indian tribes differently from other tribes, by recognizing that they have fewer sovereign powers than do other Indian tribes. *See* 25 U.S.C. § 1725(h); *Penobscot Nation v. Stilphen*, 461 A.2d 478 (Me. 1983).

The First Circuit repeatedly cited the Settlement Act as one basis for its ruling in this case. (*See, e.g.*, PIN cert. petition at A-14, A-18, n.14, A-26 to A-28.) Thus, the Court of Appeals' holding is not necessarily applicable to all Indian tribes, but rather only to those tribes subject to the Maine Settlement Act. Thus, the precedential value of the case is limited.

Other characteristics of this case demonstrate unique qualities making the case an inappropriate vehicle for broad, general higher court review. For example, PIN does not dispute the First Circuit's conclusion that Section 81 does not apply to the first Settlement Agreement, which does not even mention the Holden Lot. Hence, all the signatories to that first Settlement Agreement – including Key Bank and SHC – can still rely on that first Agreement. Therefore, even if this Court reversed the Court of Appeals' decision as to the second Settlement

Agreement, at most PIN's claims could only go forward against the few parties who only signed the second Agreement. This not only means that only a few parties to the case below have any incentive for continuing to participate in this litigation, but the two parties who actually received PIN's money – SHC directly and the Bank indirectly – could not be pursued further even if this Court answered the question presented in the manner PIN desires.

Other defenses available to the Defendant-Respondents in this particular case also make it an inappropriate vehicle to examine the "fee v. tribal land" issue. For example, the First Circuit only assumed for the purposes of its opinion that the Bank's agreement jointly to search for a buyer of the Holden Lot constituted "services" under Section 81. The tenuous nature of any such "service" underscores the fact that this case is not one which firmly and squarely focuses on the specific issue raised in the certiorari petition.

Similarly, even if PIN prevailed in having the second Settlement Agreement vitiated, PIN still has no standing to raise its underlying claims against any Defendant, because those claims are owned not by PIN, but by the Partnership. *See* the Maine Uniform Limited Partnership Act, 31 M.R.S.A. § 511 (adopting rules as to derivative suits similar to those applied in the corporate context.) The indirect relationship between PIN and the actual claims it seeks to assert defeats any logical purpose in reviewing the threshold question of Section 81 applicability.

Indeed, the fact that the Partnership, not PIN, borrowed and repaid the money at issue demonstrates that *none* of the elements needed to trigger Section 81 may have been met. Aside from proving payment for "services" "relative to Indian lands," for Section 81 to apply, the agreement must be made with an "Indian tribe." While the District Court and First Circuit held that this third element was met, given that: (1) PIN deliberately chose to use the Partnership vehicle to limit its liability and gain tax advantages; (2) the money was lent to the Partnership, not PIN; and (3) the Partnership bound itself to both Settlement Agreements, if the applicability of Section 81 to the Agreements were reviewed by this Court, the finding of the Court of Appeals on this element of applicability should also be re-visited.

Finally, the equities do not support review here. PIN invested in the Partnership. The Bank lent the Partnership money. PIN wants to obtain a windfall, by making someone (other than the Bank, since the first Settlement Agreement still applies) repay its investment. Not only would this result be unfair to the remaining Defendants (or the Bank if it somehow could be brought back in despite the continuing validity of the first Settlement Agreement), but the remedy sought by PIN appears unavailable under Section 81.

Section 81 voids contracts and allows recovery in *qui tam* actions for any money paid to any person by any Indian or tribe, or anyone else, for or on his or their behalf, on account of such services. (*See* PIN cert. petition at 3.) Even aside from the open question whether the tribe itself can pursue such a *qui tam* action, PIN is not seeking recovery of sums paid for services rendered.

Rather, it wants indemnification for the loss of its investment in the Partnership. Section 81 was not designed to provide such relief, and, for this additional reason, this action is far afield from one in which the "fee v. tribal lands" issue is squarely raised, and forms the linchpin of the suit.

Other factors show that the equities favor the Defendant-Respondents. They were explicitly informed in writing by the BIA early on in their relationship with PIN that BIA approval was only needed under Section 81 when trust land was involved. Later, when settling, the BIA also expressly approved the transfer of the Holden Lot under 25 U.S.C. §§ 1451-1543. The Defendant-Respondents did everything they could to comply with federal Indian law.

CONCLUSION

For the reasons stated above, and on the basis of the further discussion of the facts and case law set forth in the opinions of both courts below, the Petition should be denied.

Respectfully submitted,

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